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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 477

ROBERT HAINSWORTH,

Petitioner,

v.

CRAWFORD MARTIN, SECRETARY OF STATE OF THE STATE OF TEXAS, ET AL.,

Respondents.

PETITION FOR REHEARING

ROBERT W. HAINSWORTH
Counsel for Petitioner
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

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To the Honorable Mr. Chief Justice and to the Honorable Mr. Justices of the Supreme Court of the United States:

Now comes the petitioner, Robert Hainsworth, by his counsel, and respectfully prays for a rehearing of this case, which the Supreme Court held to have become moot in the light of the enactment of the Texas Apportionment Act of 1965. This petition is made upon the following grounds:

1961 APPORTIONMENT ACT YET IN EFFECT

That Section 3 of the 1961 Apportionment Act, which was enacted about May 29, 1961, provides: "This Act shall become effective for the elections, Primary and General, for all Representatives, from the places herein specified and described, to the Fifty-eighth Legislature, and continue in effect thereafter for succeeding Legislatures; * * * ". Vernon's Texas Civ. St., 1962 Supp. Art. 195.

That Section 3, of the 1965 Apportionment Act, which was enacted about May 27, 1965, provides: "This Act shall become effective for the elections, Primary and General, for all Representatives, from the places herein specified and described, to the Sixtieth Legislature, and continue in effect thereafter for succeeding Legislatures; provided specifically that this Act shall not affect the membership, personnel or Districts, of the Fifty-ninth Legislature; and provided further, that in case a vacancy occurs in the office of any Representative of the Fifty-ninth Legislature by death, resignation or otherwise, and a Special Election to fill such vacancy becomes necessary, said election shall be held in the District as it was constituted on January 1, 1965." Vernon's Texas Session Law Service, Volume No. 4, Page 758, Laws 1965, 59th Legislature, Regular Session.

From the above, it is evident that there are conflicting provisions as to when the 1965 Apportionment Act shall be effective. Listed below are some possible effective dates:

1. Effective Aug. 30, 1965, 90 days after date of adjournment.

2. On or about February 7, 1966; as the Act shall become effective for the elections, Primary and General, for all Representatives to the Sixtieth Legislature. Last filing date for such elections, on or about February 7, 1966.

3. Final effective date of the Act may extend to late in 1966; for if there is a vacancy in the 59th Legislature, the vacancy shall be filled under the 1961 Apportionment Act.

4. On or about January 1, 1967; for the present members of the legislature, the 59th Legislature, which enacted the 1965 Apportionment Act, and who were elected under the 1961 Apportionment Act, are still serving in the Legislature under the 1961 Apportionment Act, and will so con-

tinue to serve in the Legislature until after November 1, 1966, or until the end of the 59th Legislature, which is on or about January 1, 1967.

That the only instance whereby the 1961 Apportionment Act would be actually repealed as of now, is by the general provision of law, namely, 90 days after date of adjournment. And as the other possible effective dates for the 1965 Apportionment Act are still in the future, and as they are specific provisions, the specific provisions of a law take precedence over the general provisions, that therefore the 1961 Apportionment Act will be effective until late in 1966, or at the least, the earliest effective date for the repeal of the 1961 Apportionment Act would be on or about February 7, 1966.

On the basis of the above, it is respectfully submitted that the 1961 Apportionment Act is yet in effect, and has not yet been repealed, and that therefore the instant case is not moot.

If, after considering the above, and in the event that the Supreme Court of the United States concludes that the 1961 Apportionment Act has been repealed, as additional grounds for granting a rehearing, the petitioner respectfully shows the Court the following:

REQUIREMENT FOR CASE TO BE MOOT WHEN STATE STATUTE SAID REPEALED

In the case of *Berry* v. *Davis,* 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917), the Supreme Court of the United States with Mr. Justice Holmes delivering the opinion of the Court, set forth the requirments for a case to be moot, where a state statute is involved, namely:

1. The state statute must be repealed.

2. The new act or substituted statute does not apply to the plaintiff.

3. There is no possibility or threat of the new statute adversely affecting the rights of the plaintiff.

Even though it is concluded that the 1961 Apportionment Act has been repealed, still the other requirements under the *Berry* v. *Davis* case, *supra,* are not met. For the new statute, the 1965 Apportionment Act does apply to the plaintiff and petitioner. And there is possibility and threat that the 1965 Apportionment Act will adversely affect the plaintiff and petitioner here, and others similarly situated in the same manner as the 1961 Act.

Listed below are some comparative provisions of the 1961 Apportionment Act and the 1965 Apportionment Act:

County	District	1961 Act	County	District	1965 Act
Dallas	51	9 Representatives	Dallas	33	14 Representatives
Tarrant	60	7 Representatives	Tarrant	52	8 Representatives
Bexar	68	7 Representatives	Bexar	57	10 Representatives
Travis	55	4 Representatives	Travis	39	3 Representatives
Harris	22	12 Representatives	Burnet, Travis	40F	1 Representative
			Harris	22	7 Representatives
			Harris	23	6 Representatives
			Harris	24	6 Representatives

Under the 1961 Apportionment Act, all of the candidates for State Representative, in each of such counties above, ran at large or county-wide. Under the 1965 Apportionment Act, all of the candidates for State Representative, in each of such counties above, except Harris County, will run at large or county-wide. In Harris County, which has been subdivided into three districts, which parallel and correspond to the Congressional Districts in Harris County, the candidates for State Representative will run Congressional district wide.

Harris County, prior to the Congressional Reapportionment of 1965, had two Congressional Districts, namely, the Eighth Congressional District, and the Twenty-second Congressional District.

The total population 1960 for the Eighth District was 568,193. Now, of that, white, 419,764; Negro, 146,896. Now, the total of the Twenty-second District is 674,965. And that is divided white 573,924; Negro 99,452 (S.F. 31). From the above population totals it can be seen that in the Eighth Congressional District, the white population outnumbered the negro population by slightly under 3 to 1. And in the Twenty-second Congressional District, the white population outnumbered the negro population by slightly more than 5 to 1. It can be reasonably concluded that with Harris County now having three Congressional Districts, that the white population would outnumber the negro population by slightly under 3 to 1, to slightly more than 5 to 1, in each of the three Congressional Districts, or the three state Representative districts, namely, Districts 22, 23, and 24.

Under either the 1961 Apportionment Act or the 1965 Apportionment Act, as the white people outnumber the colored people, the vote of colored people will be so diluted

that the white majority voters in such multi-member districts can veto the candidacy of a colored candidate for the State legislature at their will, and colored people under the state legislative scheme of apportionment will not have as equal an opportunity as white people to be elected to the state legislature.

Since, under the rule laid down by the Supreme Court of the United States as delivered in the opinion of Mr. Justice Holmes in the Berry Case, *supra,* the instant case would not become moot because of the enactment of the Texas Apportionment Act of 1965, for it does not meet two of the requirements for a case to become moot, petitioner respectfully prays that the Supreme Court grant a rehearing of the instant case, because the new statute, the 1965 Apportionment Act, does apply to the plaintiff and petitioner, and there is possibility and threat of the new statute, the 1965 Apportionment Act adversely affecting the rights of the plaintiff and petitioner.

SUBSTANTIALITY OF FEDERAL QUESTION

In the per curiam opinion of the Court in the instant case Mr. Justice Harlan and Mr. Justice Stewart would dismiss the appeal for the want of a substantial federal question. Additionally, to show that a substantial federal question is presented, the following is repectfully submitted:

I.

The Supreme Court of the United States in *Reynolds* v. *Sims,* 84 Sup. Ct. 1381, with Mr. Chief Justice Warren delivering the opinion of the Court, stated: "A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Pro-

tection Clause is that the rights allegedly impaired are individual and personal in nature."

Mr. Justice Stewart in his dissent, in *Lucas* v. *Colorado General Assembly,* and in *WMCA, Inc.* v. *Lomenzo,* and as reported in *WMCA, Inc.* v. *Lomenzo,* 84 Sup. Ct. 1439, stated: "A policy guaranteeing minimum representation to each county is certainly rational, particularly in a State like New York. It prevents less densely populated counties from being merged into multi-county districts where they would receive no effective representation at all."

If the above view is sound, it appears that "a fortiori", the same principle would apply to colored people in a state like Texas, so that they as a racial group and as a minority, would not be merged into multi-member districts, either county-wide or congressional district wide, where they receive no effective representation at all, and their needs and interests can not be brought to the attention of the legislative body. The colored people of the State of Texas, although a minority, having their aspirations and their hopes and their interests; just as surely belong to the State of Texas as do the majority white people, who can by the scheme of legislative apportionment in effect in Texas elect all of the state representatives to the State Legislature to the exclusion of any colored state representative.

And it may be noted that even under the apportionment formula of New York State, that in New York City there are individual state representative districts; and not multi-member state representative districts, where the state representatives run city wide or county wide.

If there is rationality in the apportionment plan of New York and Colorado as discussed by Mr. Justice Stewart in his dissent, then it most respectfully appears that there is irrationality in the Texas plan or scheme of legislative

apportionment as well as a substantial federal question, for the State of Texas by its plan or scheme of apportionment has completely silenced or engulfed the colored people of the State for scores of years in so far as being elected to the State Legislature is concerned. And it should also be remembered, that the less densely populated counties of Colorado and New York, have had for scores of years, if not ever since that each was a sovereign State, some representation in the legislature body, while the negro people of the State of Texas have not had a negro representative in the legislative body for scores of years. (S.F. 93).

II.

Mr. Justice Harlan in his dissent in *Reynolds* v. *Sims*, 84 Sup. Ct. 1396, goes back "to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand". And at page 1399, there are quotes from Mr. Thaddeus Stevens in the House concerning the Equal Protection Clause. "This amendment * * allows Congress to correct the unjust legislation of the States so that the law which operates upon one man shall operate equally upon all." And at page 1400, " * * * I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, * * *".

And quoting from the remarks of Mr. Binham, page 1400, " * Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right under the forms of law or otherwise, to deny to any person the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy."

And on page 1401, quoting from the debate in the Senate, with Senator Howard explaining the meaning of the Equal Protection Clause, he said: "* * * It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man". * * *."

It is respectfully submitted that the legislative history of the Fourteenth Amendment shows that the design and purpose of the Fourteenth Amendment was to protect the colored man from hostile and discriminatory State action, to accord to the colored man the same rights as to a white man, and if that is so, then the Equal Protection of the Laws Clause of the Fourteenth Amendment should require the State of Texas to enact an apportionment statute, a plan of legislative apportionment that will enable a colored man to have as equal an opportunity as a white man to be elected to the state legislature. And that means that the state representative districts in the larger counties of the State of Texas that are entitled to two or more state representatives are apportioned into single member state representative districts, and that multi-member state representative districts in Texas are not permissible because racially discriminatory. Too, single member districts in such counties would not deprive or deny to white people of the State of Texas any constitutional right.

In *Reynolds* v. *Sims,* Pages 1403, 1404, Mr. Justice Harlan further quotes in his dissent: "Each of the 10 'reconstructed' States was required to ratify the Fourteenth Amendment before it was readmitted to the Union. The Constitution of each was scrutinized in Congress".

The Constitution of the State of Texas of 1866, provided in Article III, Section 5. "No person shall be a representative unless he be a white citizen of the United States, * * *".

Vol. 3, of Vernon's Ann. Tex. Const. Art. 3, Sec. 5. (Page 605).

By looking at the history of Texas from even beyond the Fourteenth Amendment, it is evident that the State policy has been, prior to the Fourteenth Amendment, by a provision of the State Constitution, and since that time, with the exception of the period from the adoption of the Fourteenth Amendment until about the 1880's or 1890's, to keep colored people out of the Legislature of the State of Texas. And this has been done in some years past after the adoption of the Fourteenth Amendment, by means of the White Man's Primary, note the "White Primary" cases, *Nixon* v. *Herndon,* 273 U.S. 536, *Nixon* v. *Condon,* 286 U.S. 73, *Grovey* v. *Townsend,* 295 U.S. 45, *Smith* v. *Allwright,* 321 U.S. 649; and after the Supreme Court held that the "White Primary" was unconstitutional, the State of Texas has continued to effectuate the State policy of keeping colored people out of the State Legislature, through its scheme or method or system of legislative apportionment which has been on the statute books of the State for scores of years.

For the reasons stated above, it is respectfully submitted that there is a substantial federal question presented in the instant case.

CONCLUSION

Wherefore, in order that justice may be done in the instant case, and upon the grounds stated herein, it is respectfully submitted that the Supreme Court follow the rule laid down in *Berry* v. *Davis,* 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917), and not overrule *Berry* v. *Davis, supra,* and that this petition for rehearing be granted, that the Supreme Court take jurisdiction of this appeal, give

plenary consideration to the question presented, with briefs on the merits, and oral argument for their solution, and that the consideration of the case be advanced.

Respectfully submitted,

ROBERT W. HAINSWORTH
Counsel for Petitioner
Alvin Building
3710 Holman Avenue
Houston, Texas 77004

PROOF OF SERVICE

Proof of service is shown by separate instrument. Forty copies of the Petition for Rehearing, printed in conformity with Rule 39, are mailed to the Clerk of the Supreme Court of the United States for filing, accompanied by the original copy of Proof of Service.

CERTIFICATE

I certify that this petition is presented in good faith and not for delay.

ROBERT W. HAINSWORTH
Counsel for Petitioner

END